81-2359

No. 81-

Office - Supreme Court, U.S.
FILED
JUN 25 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,

Petitioners,

against

PHONETELE, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HOWARD J. TRIENENS
Counsel of Record for Petitioners
195 Broadway
New York, New York 10007
(212) 393-5111

Of Counsel:

JIM G. KILPATRIC
WILLIAM J. JONES

ANDREW M. WHITE
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT

JUNE 25, 1982

No. 81-

IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,

Petitioners,

-against-

PHONETELE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners[1] pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, which reversed a judgment of the United States District Court for the Central District of California dismissing this private treble damage antitrust action. The District Court had found that because petitioners' tariffs and related conduct at issue here are regulated by the Federal Communications Commission ("FCC") under a public interest standard that is inconsistent with the pure competition standard of the antitrust laws, that conduct has been impliedly immunized from antitrust

1. Pursuant to Rule 28.1 of the Rules of this Court, petitioners set forth below the names of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the petitioners:

Cincinnati Bell Inc.
Cuban American Telephone and Telegraph Company
Gold Star Semiconductor Limited
The Southern New England Telephone Company.

attack. The Court of Appeals reversed, holding that implied antitrust immunity is unavailable to petitioners in this case because the subject tariffs were initiated by petitioners, rather than by the FCC, and were subsequently disapproved by that agency (even though such disapproval was prospective only, and followed the institution of an FCC-administered alternative program to petitioners' tariffs). The Court of Appeals also concluded that antitrust immunity does not attach in this case because the conduct at issue here was not mandated by the pervasive scheme of common carrier regulation to which petitioners are subject.

Question Presented

Whether the district court may assert jurisdiction over an antitrust complaint charging restraint of trade in, and monopolization of, telecommunications services and equipment that petitioners provide through affiliated operating telephone companies solely as pervasively regulated common carriers under Title II of the Communications Act of 1934, which prescribes a public interest standard governing the challenged conduct inconsistent with that of the antitrust laws.

TABLE OF CONTENTS

	PAGE
Question Presented	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
STATEMENT OF THE CASE	1
Proceedings Below	1
The Regulatory Context of the Case	5
A. The Establishment of Common Carrier Responsibility and the Regulation of Interconnection	5
B. The Introduction of Terminal Equipment Competition	9
ARGUMENT	14
The Decision Below Misconstrues And Conflicts With Controlling Decisions By This Court On Implied Antitrust Immunity	14
A. Immunity Must Be Found Because of the Inconsistency Between the Antitrust and Regulatory Standards	14
B. Immunity Must Be Found Because of Pervasive Regulation	20
CONCLUSION	25

TABLE OF AUTHORITIES

PAGE

Cases:

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 50 U.S.L.W. 4512 (U.S. May 18, 1982) 10

American Tel. & Tel. Co. v. FCC, 487 F.2d 865 (2d Cir. 1973) 19

California v. FPC, 369 U.S. 482 (1962) 21

Carter v. American Tel. & Tel. Co., 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) 8, 22

FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) 7, 16, 18

Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975) 5, 14, 15, 17 18, 19, 23

Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974) 16

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 20, 21, 23

Interconnect Planning Corp. v. American Tel. & Tel. Co., 465 F. Supp. 811 (S.D.N.Y. 1978) 19

Jarvis, Inc. v. American Tel. & Tel. Co., 481 F. Supp. 120 (D.D.C. 1978) 19

Litton Systems, Inc. v. American Tel. & Tel. Co., 487 F.Supp. 942 (S.D.N.Y. 1980) 19

New England Tel. & Tel. Co. v. Department of Pub. Util., 262 Mass. 137, 159 N.E. 743 (1928) 7

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 21

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 20, 21, 23

Phonetele, Inc. v. American Tel. & Tel. Co., 435 F. Supp. 207 (C.D.Cal. 1977), *rev'd*, 664 F.2d 716 (9th Cir. 1981) *modified* March 15, 1982 (9th Cir.) 1, 3, 4

Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981) *modified* March 15, 1982 (9th Cir.) 1, 4, 5, 16, 17 18, 21, 22, 23

PAGE

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) 10

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 21

Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324 (8th Cir. 1980) 19

Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500 (1936) 20, 23

United States v. American Tel. & Tel. Co., 461 F. Supp. 1314 (D.D.C. 1978) 19

United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975) 5, 14, 15, 17, 18 19, 20, 21, 22, 23

United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) 21

United States v. Radio Corp. of America, 358 U.S. 334, (1959) 21

Regulatory Proceedings:

AT&T "Foreign Attachment" Tariff Revisions, 15 F.C.C. 2d 605 (1968), *reconsideration denied*, 18 F.C.C. 2d 871 (1969) 9, 10, 11

Carterfone, 13 F.C.C. 2d 420, *reconsideration denied*, 14 F.C.C. 2d 571 (1969) 9, 12

City of Los Angeles v. Southern Cal. Tel. & Tel. Co., 2 P.U.R. (N.S.) 247 (Cal. R.R. Comm'n 1933) 7

Hotel Sherman Co. v. Chicago Tel. & Tel. Co., P.U.R. 1915F 776 (Ill. Pub. Util. Comm'n 1915) 7

Hush-A-Phone Corp., 20 F.C.C. 319 (1955), *rev'd on other grounds*, 238 F.2d 266 (D.C. Cir. 1956) 9

In Re Bluffs & Winchester Tel. Co., P.U.R. 1915A 928 (Ill. Pub. Util. Comm'n 1915) 7

Interstate and Foreign MTS and WATS

35 F.C.C. 2d 539 (1972) 11

40 F.C.C. 2d 315 (1973) 11, 12

56 F.C.C. 2d 593 (1975), 58 F.C.C. 2d 716 (1976), 58 F.C.C. 2d 736 (1976) *aff'd sub nom. North Carolina Utils. Comm'n v. F.C.C.*, 552 F.2d 1036 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) 12, 13

59 F.C.C. 2d 83 (1976), 64 F.C.C.2d 1058 (1977), 67 F.C.C. 2d 1255 (1978) 12

Littlepage v. Mosier Valley Tel. Co., P.U.R. 1918E 425 (Or. Pub. Serv. Comm'n 1918) 7

Re Curtis Tel. Co., P.U.R. 1917A 674 (Neb. R.R. Comm'n 1916) 7

PAGE

Re Franksville Tel. Co., P.U.R. 1917A 270 (Wis. R.R. Comm'n 1916) 7

Re Springs Mut. Tel. Co., P.U.R. 1918A 488 (S.D. Bd. R.R. Comm'rs 1917) 7

Telerent Leasing Corp., 45 F.C.C. 2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) 13

Western States Tel. Co. v. American Tel. & Tel. Co., 19 F.C.C. 2d 1068 (1969) 10

Federal Statutes:

Clayton Act, 15 U.S.C. § 12 *et seq.* (1976) 1
§ 14 1
§§ 15, 25, 26 2

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1976) 1,2,8
§ 151 8
§ 153(a), (b) 8, 22
§ 201 ..... 6, 15, 22
§ 202 6
§ 203 6
§ 205 6
§ 213 6
§ 214 ..... 6, 15, 22
§ 214(a) 6
§ 214(d) 6, 8
§ 215 6
§ 410(c) 11
Interstate Commerce Act, 49 U.S.C. § 1 *et* seq. (1976) 7
Maloney Act, 15 U.S.C. § 78o-3 (1976) 22
Mann-Elkins Act of 1910, 36 Stat. 539 (1910) 7
Sherman Act, 15 U.S.C. § 1 *et seq.* (1976) 1
§§ 1, 2 1
§ 4 2
Transportation Act of 1920, 41 Stat. 456 7
28 U.S.C. § 1254(1) (1976) 1

Federal Regulations:

47 C.F.R. pt. 68 (1981) 12

State Statutes:

Cal. Pub. Util. Code § 451 (West 1975) 5, 6
Cal. Pub. Util. Code §§ 701, 728-729, 761-762, 766-769 (West 1975) 6

	PAGE
Conn. Pub. Acts 1879, ch. 36	6
Md. Ann. Code art. 78 (1980)	6
Md. Ann. Code art. 78, § 28 (1980)	5
Md. Ann. Code art. 78, § 75 (1980)	6
Mo. Rev. Stat. 1879 § 883	6
Neb. Rev. Stat. ch. 75, arts. 1, 6-8 (1976)	6
Neb. Rev. Stat. ch. 75, art. 6, § 609 (1976)	5
Neb. Rev. Stat. ch. 75 art. 6, § 611 (1976)	6
N.Y. Pub. Serv. Law art. 5 (McKinney 1955)	6
N.Y. Pub. Serv. Law § 91 (McKinney 1955)	5, 6
Ohio Rev. Code Ann. tit. 49, chs. 4901, 4903, 4905, 4909, 4931 (Page 1977)	6
Ohio Rev. Code Ann. tit. 49, § 4905.21 (Page 1977)	6
Ohio Rev. Code Ann. tit. 49, § 4905.22 (Page 1977)	6
Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon 1980)	6
Tex. Rev. Civ. Stat. Ann. art. 1446c, §§ 35, 38 (Vernon 1980)	6
Tex. Rev. Civ. Stat. Ann. art. 1446c, § 58 (Vernon 1980)	6
Congressional Materials:	
Report of Special Study of Securities Markets of the SEC, H.R. Doc. No. 95, pt. 4, 88th Cong., 1st Sess. (1963)	22
S. Rep. No. 781, 73rd Cong., 2d Sess. (1934)	8
H.R. Rep. No. 1850, 73rd Cong., 2d Sess. (1934)	7
Miscellaneous:	
1 P. Areeda & D. Turner, *Antitrust Law*, ¶ 224(d) (1978)	17
Computer Science and Engineering Board of the National Academy of Science, *Technical Analysis of Common Carrier/User Interconnection* (1970)	11
Memorandum for the Civil Aeronautics Board as *Amicus Curiae*, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973)	23

Opinions Below

The initial opinion of the Court of Appeals, filed December 3, 1981, is officially reported at 664 F.2d 716. The March 15, 1982, opinion of the Court of Appeals, modifying in part its initial decision, is not yet reported. The opinion of the District Court, filed July 26, 1977, is officially reported at 435 F. Supp. 207. Copies of the foregoing opinions appear in Appendices A, B and C hereto.[2]

Jurisdiction

The judgment of the Court of Appeals was entered on December 3, 1981. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order filed March 31, 1982 (Appendix D hereto), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The pertinent portions of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.*), the Clayton Act (38 Stat. 730, as amended, 15 U.S.C. § 12 *et seq.*), and the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.*) are set forth in Appendix E hereto.

STATEMENT OF THE CASE

Proceedings Below

This petition arises out of the dismissal of a complaint charging that, by filing, implementing, and enforcing tariffs that set forth terms and conditions for the interconnection of customer-provided telephone equipment, petitioners have violated sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and section 3 of the Clayton Act (15 U.S.C. § 14).

2. Because the Appendices to this Petition are voluminous, they are being separately presented herewith pursuant to Rule 21.1(k) of this Court.

Petitioners American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc., together with their twenty-three affiliated operating telephone companies, are part of an integrated telecommunications common carrier enterprise known as the Bell System. In cooperation with some 1,400 independent telephone companies, the Bell System owns, operates, and manages the nationwide telecommunications network under a pervasive scheme of regulation established by the Communications Act of 1934 (47 U.S.C. § 151 *et seq.*) and comparable state regulatory statutes in each of the contiguous forty-eight States and the District of Columbia. Bell System companies are required by law to provide terminal equipment to their customers as a part of the telecommunications service they provide under tariffs on file with the appropriate regulatory agencies in the jurisdictions in which they operate. Throughout the period involved in this case, the Bell System's interconnection tariffs also set forth the terms and conditions upon which customer-provided devices could be interconnected to the nationwide telecommunications network.

Respondent Phonetele, Inc., is engaged in the manufacture and sale of a device known as the "Phonemaster," which, when connected to telephone lines, monitors dialing signals and permits or restricts transmission of telephone calls to predetermined calling areas. Phonetele is not licensed to provide, and does not provide, telephone service. Instead, Phonetele sells its Phonemaster device directly to members of the general public, who then connect that device to the nationwide telecommunications network over which telephone service is provided by telecommunications common carriers. In 1974, Phonetele initiated this action in the United States District Court for the Central District of California, purporting to base jurisdiction upon section 4 of the Sherman Act (15 U.S.C. § 4) and sections 4, 15 and 16 of the Clayton Act (15 U.S.C. §§ 15, 25 and 26).

The complaint in this case (Appendix F hereto) constitutes a direct attack upon the filing, implementation, and enforcement of the Bell System's interconnection tariffs. Thus, the complaint

alleges as an antitrust violation that petitioners "caused to be filed" tariffs pertaining to the interconnection of customer-provided equipment (Complaint ¶ 32; A-104), that petitioners "actively enforce" these tariffs (Complaint ¶ 33; A-105), and that the tariffs were "interpreted" by petitioners to apply to respondent's Phonemaster device (Complaint ¶ 34; A-105). The remaining conduct alleged in the complaint also relates to the implementation of these interconnection tariffs. Thus, Phonetele alleges that the protective connecting arrangements required by these interconnection tariffs were "needlessly expensive" in California (Complaint ¶ 35; A-105), were even more costly in New York (Complaint ¶ 39; A-106), and were not always available when requested (Complaint ¶¶ 36-38; A-105-106). Phonetele also alleges that the Bell System's provision of telephone equipment to its customers as a part of the telecommunications service provided in accordance with its tariffs constitutes an unlawful tie-in of telephone equipment with "telephone lines" in violation of the antitrust laws (Complaint ¶¶ 41-42; A-106-107).

In granting petitioners' motion to dismiss the complaint, the District Court held that these claims are not properly cognizable under the antitrust laws because the regulatory program established by Congress in the Communications Act vests "comprehensive jurisdiction" over the terms, implementation, and enforcement of tariffs pertaining to the interconnection of customer-provided equipment in the Federal Communications Commission ("FCC") pursuant to a "public interest standard" and that the public interest standard under which this regulatory jurisdiction is exercised is fundamentally different from, and inconsistent with, "the antitrust goals of encouraging free competition." 435 F. Supp. at 210-211; A-71-73. After carefully analyzing both the FCC's broad regulatory powers and the specific exercise of those powers in connection with the particular interconnection tariffs at issue in this case, the District Court determined that the antitrust laws and the laws governing the regulation of interconnection "are sufficiently mutually repugnant to compel the inference that Congress intended to repeal the

antitrust laws otherwise applicable to the area of interconnection" (435 F. Supp. at 212; A-74) and concluded that immunity from the antitrust laws must obtain to "prevent the application of conflicting statutory standards to the [petitioners] and . . . [to] protect the integrity of the regulatory program that Congress established in the Communications Act" (435 F. Supp. at 214; A-76).

The Court of Appeals, in a 2-1 decision, reversed. The panel majority's opinion at the outset briefly described the regulatory scheme embodied in the Communications Act and went on to review the historical background of petitioners' interconnection tariffs and the FCC's actions and decisions regarding interconnection. 664 F.2d at 721-26; A-4-8.[3] The majority opinion cited as "critical" the fact that the interconnection tariffs and related conduct at issue here were "initiated by [petitioners] and not the FCC." *Id.* at 727 n.32; A-32. The panel majority then ruled that a necessary prerequisite for implied antitrust immunity is the existence of an "inconsistency between the challenged conduct and an express policy of the governing agency," rather than an inconsistency between the legal standard of the antitrust laws and that of the regulatory statute. *Id.* at 732; A-14. The majority went on to conclude that, because the FCC in 1975, seven years after the tariffs were filed, ultimately found petitioners' interconnection tariffs to be unreasonable for the future in view of the establishment of an alternative, FCC-prescribed approach to interconnection, "this case involves no conflict between pro-competitive antitrust policies and agency policies." *Id.* at 733; A-16.

The panel majority also declined to find petitioners' interconnection practices impliedly immunized from antitrust liability by the pervasive scheme of common carrier regulation embodied in the Communications Act. *Id.* at 728-30; A-11-13. The panel majority concluded that, in contrast to cases in which such pervasive regulation has been found to give rise to implied antitrust

3. Additional facts pertinent to the regulation of petitioners' interconnection practices and agency action thereon are described at pages 9-13, *infra*.

immunity (*e. g., United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975)), the legislative history of the Communications Act showed no congressional awareness of the practices at issue here (*id.* at 729; A-12); that there was no "specific statutory authorization" for petitioner's interconnection tariffs, and that the "crucial factor" of sanction of those practices by the FCC was absent (*id.* at 730; A-13); and that the FCC's regulatory responsibility under the Communications Act "differs decisively" from that of the agencies in cases in which implied immunity has been found (*id.*).

The Regulatory Context of the Case

As petitioners demonstrate below, the only facts relevant to determining implied immunity under the governing legal standard are those pertaining to the nature and scope of regulatory authority. For that reason, it is necessary to address the regulatory context within which the conduct at issue in this case arose. Regulatory statutes, rules, orders, and other matters of record in administrative proceedings are subject to judicial notice by this Court. *See Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 686 (1975) ("We have before us the detailed experience of the [agency] regulatory activities, and we have the debates in the Congress. . . . This information is sufficient to permit an informed decision as to the existence of an implied repeal.")

A. The Establishment of Common Carrier Responsibility and the Regulation of Interconnection

The state regulatory statutes that were enacted in the late nineteenth and early twentieth centuries dealing with the provision of telecommunications services provided that telephone companies should be treated as common carriers, thereby imposing a whole range of service responsibilities. A common carrier has an obligation to provide reasonably adequate service at reasonable rates within its geographic areas[4] and it must continue to provide

4. *See, e.g.*, Cal. Pub. Util. Code § 451 (West 1975); Md. Ann. Code art. 78, § 28 (1980); N.Y. Pub. Serv. Law § 91 (McKinney 1955); Neb. Rev. Stat. ch. 75, art. 6, § 609 (1976); Ohio Rev. Code

such service unless and until it receives authority to abandon service from the responsible regulatory agency.[5] These common carrier obligations are monitored and enforced by regulatory controls over every aspect of the telecommunications business, including controls over the rates and profits of the carriers, over the kinds, quality, and availability of the service offered by the carriers, over the relationships between carriers, and over entry into and exit from any segment of the industry.[6]

By 1910, nearly every State in the country had enacted legislation of this kind to govern the provision of telecommunications services,[7] and the common carrier responsibilities imposed by these statutes upon the telephone companies—particularly statutes relating to the obligation of the companies to provide end-to-end service—were vigorously enforced. For example, when some independent telephone companies permitted users to provide their own equipment, state regulatory agencies ordered the telephone companies involved to purchase that equipment from their customers so as to make clear the companies' obligation to protect the integrity of the network by timely and proper maintenance and replacement of all equipment connected to the

---

Ann. tit. 49, § 4905.22 (Page 1977); Tex. Rev. Civ. Stat. Ann. art. 1446c, §§ 35, 38 (Vernon 1980). Common carriers have the same obligation in furnishing interstate telecommunications service. *See* 47 U.S.C. §§ 201, 214(d).

5. *See, e.g.*, Cal. Pub. Util. Code § 451 (West 1975); Md. Ann. Code art. 78, § 75 (1980); N.Y. Pub. Serv. Law § 91 (McKinney 1955); Neb. Rev. Stat. ch. 75, art. 6, § 611 (1976); Ohio Rev. Code Ann. tit. 49, § 4905.21 (Page 1977); Tex. Rev. Civ. Stat. Ann. art. 1446c, § 58 (Vernon 1980). *Cf.* 47 U.S.C. § 214(a) (imposing requirement with respect to interstate telecommunications service).

6. *See, e.g.*, Cal. Pub. Util. Code §§ 701, 728-729, 761-762, 766-769 (West 1975); Md. Ann. Code art. 78 (1980); N.Y. Pub. Serv. Law art. 5 (McKinney 1955); Neb. Rev. Stat. ch. 75, arts. 1, 6-8 (1976); Ohio Rev. Code Ann. tit. 49, chs. 4901, 4903, 4905, 4909, 4931 (Page 1977); Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon 1980); *cf.* 47 U.S.C. §§ 201-203, 205, 213-215.

7. In 1879, Connecticut and Missouri became the first States to regulate telephone companies as public utilities (Conn. Pub. Acts 1879, ch. 36; Mo. Rev. Stat. 1879 § 883). Today every State comprehensively regulates telecommunications service in accordance with common carrier principles.

network.[8] These state regulatory agencies also consistently rejected requests by customers for permission to interconnect their own equipment to the lines of the telephone company.[9]

The first statute establishing federal regulation of telecommunications, the Mann-Elkins Act of 1910 (36 Stat. 539), subjected telecommunications common carriers to regulation by the Interstate Commerce Commission under the Interstate Commerce Act (49 U.S.C. § 1 *et seq.* (1976)) on substantially the same basis as railroads. When the Interstate Commerce Act was amended by the Transportation Act of 1920 (41 Stat. 456) to reflect an important shift in federal regulatory policy "from one of prohibiting restraints on competition to one of providing relief from the rigors of competition," that shift in policy was, therefore, fully as applicable to telecommunications common carriers as it was to railroads. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 92 (1953). Subsequently, in order to close the "many important gaps"[10] that existed in the federal regulation of the telecommunications industry under the Interstate Commerce Act, Congress

8. *See, e.g., In re Bluffs & Winchester Tel. Co.*, P.U.R. 1915A 928 (Ill. Pub. Util. Comm'n 1915); *Re Franksville Tel. Co.*, P.U.R. 1917A 270 (Wis. R.R. Comm'n 1916); *Re Curtis Tel. Co.*, P.U.R. 1917A 674 (Neb. R.R. Comm'n 1916); *Re Springs Mut. Tel. Co.*, P.U.R. 1918A 488 (S.D. Bd. R.R. Comm'rs 1917); *Littlepage v. Mosier Valley Tel. Co.*, P.U.R. 1918E 425 (Or. Pub. Serv. Comm'n 1918).

9. *See, e.g., City of Los Angeles v. Southern Cal. Tel.Co.*, 2 P.U.R. (N.S.) 247, 249, 251-252 (Cal. R.R. Comm'n 1933); *Hotel Sherman Co. v. Chicago Tel. Co.*, P.U.R. 1915F 776, 782-83 (Ill. Pub. Util. Comm'n 1915); *New England Tel. & Tel. Co. v. Department of Pub. Util.*, 262 Mass. 137, 159 N.E. 743 (1928).

10. The legislative history of the Communications Act makes clear the purpose of that Act to establish a comprehensive and pervasive scheme of regulation:

> [T]he [Interstate Commerce] Act never has been perfected to encompass adequate regulation of communications, but has really been an adaption of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the terms of the act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of court and commission interpretation of that act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers.

H.R. Rep. No. 1850, 73rd Cong., 2d Sess. at 4 (1934).

enacted the Communications Act of 1934 (47 U.S.C. § 151 *et seq.* (1976)), which removed telecommunications common carriers from the jurisdiction of the Interstate Commerce Commission and subjected them to regulation by a new agency, the Federal Communications Commission, having comprehensive jurisdiction over the industry[11] and substantial "additional authority".[12] The Communications Act of 1934 expressly preserved state jurisdiction over certain aspects of the telecommunications industry while establishing comprehensive federal jurisdiction over the remaining aspects of the industry, thus creating an "intricate statutory structure in which scarcely a single business act is free from continuous regulation or at least administrative governmental review."[13]

The plan of regulation embodied in the Communications Act was identical to that already in effect in most of the states: telecommunications common carriers were required to offer to the public "all instrumentalities, facilities, apparatus, and services" necessary to provide telecommunications service (47 U.S.C. § 153(a), (b) (1976)); and the FCC was given broad powers to assure the availability and quality of the equipment needed to make available that service, including the power to "require by order any carrier . . . to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier . . ." (*id.* § 214(d)). Where state and federal regulatory statutes imposed common obligations, the telephone companies generally filed the same tariffs with the FCC as were filed with the state regulatory agencies. Hence, the tariffs accepted by the FCC following the enactment of the Communications Act contained provisions generally prohibiting the interconnection of customer-provided equipment in terms essentially identical to those embodied in state tariffs.

11. *See* S. Rep. No. 781, 73rd Cong., 2d Sess. at 3 (1934).
12. 47 U.S.C. § 151 (1976).
13. *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 495 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

B. The Introduction of Terminal Equipment Competition

In *Carterfone*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968), the FCC embarked upon a new regulatory policy with respect to the interconnection of customer-provided equipment to the telephone network. In that decision, which dealt only with an acoustically-connected device that did not duplicate or replace any equipment provided by the telephone companies, the FCC invalidated those provisions in the telephone companies' tariffs that had traditionally prohibited the attachment of customer-provided equipment to the network and ordered that the interconnection of such equipment should henceforth be allowed "so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others." 13 F.C.C.2d at 424.

In announcing this new policy, the Commission specifically pointed out that the carriers "were in no wise precluded from adopting reasonable standards to prevent harmful interconnection." 14 F.C.C.2d at 572. Its decision left "to the initiative of the telephone companies" the problem of reconciling the conflict between the new policy of allowing the attachment of customer-provided equipment to the telephone network and the concern for network safety and efficiency. *Id.*[14] Moreover, this conflict had to be resolved by the carriers at a time when even the Commission was openly acknowledging that it was then "in no position to determine the extent to which" interconnection of customer-provided equipment could properly be permitted "consistent with efficient and economic telephone service. . . ." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968),

14. Consistent with the long line of state regulatory decisions discussed at p. 7, nn. 8-9 above, recognizing the complete, end-to-end-service responsibility of telephone common carriers, the FCC had earlier determined that telephone companies have a "right and responsibility" under the Communications Act "to prevent the harmful effects of improper devices or customer practices from being introduced into the system." *Hush-A-Phone Corp.*, 20 F.C.C. 391, 424-25 (1955), *rev'd on other grounds*, 238 F.2d 266 (D.C. Cir. 1956).

reconsideration denied, 18 F.C.C. 2d 871, 873 (1969); *Western States Tel. Co.* v. *American Tel. & Tel. Co.*, 19 F.C.C.2d 1068, 1072 (1969).

The Bell System responded to the Commission's new policy by filing the so-called post-*Carterfone* tariffs which Phonetele seeks to attack under the antitrust laws in this case. These tariffs went beyond *Carterfone* by permitting the direct electrical connection to the telephone network, through a network control signaling unit and protective connecting arrangement provided, installed and maintained by an operating telephone company, of any customer-provided equipment which met certain minimal technical standards set forth in the tariffs. The Bell System could not file tariffs requiring the FCC to adopt and administer a program imposing standards on interconnected equipment (also referred to as a certification program). The only certification alternative available in 1968 would have been for the Bell System to devise, impose and enforce standards on its own, a course which would have placed it in the untenable position of setting standards for the business activities of its competitors, thereby exposing it to potential antitrust liability. *See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *see also American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 50 U.S.L.W. 4512 (U.S. May 18, 1982).

Immediately after their filing in 1968, the FCC undertook an intensive investigation of the new tariffs—an investigation in which virtually everyone interested in the interconnection question (including Phonetele) participated. The Commission concluded that the new tariffs should be permitted to go into effect, and in so doing the FCC specifically pointed out that the tariffs were "not in conflict with [the] *Carterfone* ruling." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871, 872 (1969). However, the FCC declined formally to approve the tariffs and maintained its option to decide thereafter that a regulatory

approach different from that reflected in the post-*Carterfone* tariffs might ultimately be found to serve the public interest better for the future. 15 F.C.C.2d at 610-11.

The FCC's acceptance of the post-*Carterfone* tariffs was only the beginning of an intensive period of regulatory activity concerning the interconnection of terminal equipment to the telephone network. Contemporaneously with its acceptance of the post-*Carterfone* tariff revisions, the FCC commissioned a study by the National Academy of Science of the "complex scientific and technical issues" raised by its new interconnection policy. *AT&T "Foreign Attachment" Tariff Revisions*, 18 F.C.C.2d 871, 875 (1969).[15] The Commission later initiated an informal investigation of interconnection by the Chief of its Common Carrier Bureau, in an effort to determine the feasibility of other approaches to the interconnection of customer-provided equipment "without impairing the functioning of the basic nationwide telephone network" and without causing "adverse effects upon . . . services provided to the public generally." *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 540 (1972). The FCC also instituted Docket 19528, a Federal-State Joint Board investigation of interconnection, in cooperation with the state regulatory agencies under section 410(c) of the Communications Act (47 U.S.C. § 410(c) (1976)), in order to decide whether "to go beyond what we ordered in *Carterfone* . . . and, if so, what terms and conditions should apply to protect the telephone system and services of others." 35 F.C.C.2d at 542.[16]

15. The Academy subsequently concluded that "uncontrolled interconnection to the common carrier network as it now exists would be harmful," and that the PCA, or a certification program properly authorized and enforced by a governmental agency, were reasonable methods of protecting the network from harm. Computer Science and Engineering Board of the National Academy of Science, *Technical Analysis of Common Carrier/User Interconnection*, at ii (1970).

16. The FCC thereafter continued to express its uncertainty as to whether alternatives to petitioners' post-*Carterfone* tariffs were in the public interest. In its First Supplemental Notice in Docket 19528, released in April, 1973, the FCC acknowledged that the threshhold question involved in the proceeding was

> whether the telephone companies . . . should be required or *permitted* to make further significant revisions in their . . . tariffs

In 1975, seven years after *Carterfone*, the FCC established a registration program under which most types of terminal equipment may be submitted to the FCC for registration under a detailed set of technical criteria prescribed by the Commission to protect against network harm.[17] If registered with the FCC, such equipment no longer requires a protective connecting arrangement.[18] However, recognizing the risks of harm to the network from uncontrolled interconnection, the registration orders specifically required the continued use of a protective connecting arrangement for the interconnection of equipment not registered with the FCC. *Interstate and Foreign MTS and WATS*, 56 F.C.C. 2d 593, 599 (1975), 58 F.C.C. 2d 736, 747 (1976), 67 F.C.C. 2d 1255, 1272 n.21 (1978). In view of its prescription of a registration program as an alternative "effective means for preventing such harms," the FCC found the post-*Carterfone* tariffs, which required the use of PCAs for all interconnections, to be prospectively unreasonable. 56 F.C.C. 2d at 598-99. Finally,

---

> so as to give customers options that they do not now have thereunder, namely that of being able generally to provide their own network control signalling units (NCSUs) and any needed connecting arrangements (CAs), or the functional equivalent thereof, in lieu of using telephone company-provided NCSUs and CAs as is now required under the tariffs in all interconnection situations involving direct electrical connections. The second basic issue is to determine what terms and conditions should govern *if we should decide to extend such options to customers.*

Interstate and Foreign MTS and WATS, 40 F.C.C.2d 315 (1973) (emphasis supplied).

17. The regulations for the Commission's registration program, 47 C.F.R. pt. 68, comprise more than a hundred pages of procedures and technical specifications or performance criteria.

18. *See Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593 (1975) (First Report and Order in Docket No. 19528), 58 F.C.C.2d 716 (1976) (Memorandum Opinion and Order in Docket No. 19528), 58 F.C.C.2d 736 (1976) (Second Report and Order in Docket No. 19528), *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Interstate and Foreign MTS and WATS*, 59 F.C.C.2d 83 (1976) (Memorandum Opinion and Order in Docket No. 19528), 64 F.C.C.2d 1058 (1977) (Memorandum Opinion and Order in Docket No. 19528), 67 F.C.C.2d 1255 (1978) (Third Report and Order in Docket No. 19528).

the FCC made clear that its activity in the interconnection area by no means ended with the promulgation of the registration program:

> [A]s the registration program established herein is new, we believe it should be subject to continuing review and modification, if necessary, as actual experience under the program warrants.

56 F.C.C.2d at 613.

The FCC's regulatory authority extended to the Bell System's conduct in implementing and enforcing the post-*Carterfone* tariffs. Thus, as the FCC expressly pointed out in *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976):

> We have also been monitoring the manner and effectiveness with which the telephone companies are administering their tariff regulations, *with particular reference to the availability and efficiency of the interface protective arrangements required by such tariffs.* We would expect the State commissions to do likewise in discharging their responsibilities with respect to the maintenance of efficient intrastate service.

45 F.C.C.2d at 222 (emphasis supplied).

In short, the history of interconnection shows a consistent pattern of active and pervasive regulation by the FCC under the public interest standard. As the Commission itself put it in *Telerent*:

> The Commission's powers to regulate interstate and foreign communications services are comprehensive and pervasive and embrace the terms and conditions under which customers shall be reasonably permitted to use their own equipment in connection with such services.

Id. at 217.

ARGUMENT

The Decision Below Misconstrues And Conflicts With Controlling Decisions By This Court On Implied Antitrust Immunity

The court below erroneously reversed the District Court's dismissal of a complaint charging that the filing, implementation and enforcement of tariffs setting forth the terms and conditions for the interconnection to telephone company lines of customer-provided equipment are in violation of the Sherman Act. In ruling that the conduct in question was not impliedly immune from the antitrust laws, the lower court misconstrued this Court's decisions in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), holding that implied antitrust immunity is based upon inconsistent statutory standards or pervasive regulation. Because the conduct at issue is subject to a public interest standard which is inconsistent with the competitive standard of the antitrust laws, and the Federal Communications Commission pervasively regulates such conduct, the court below is in error and should be reversed. This action is only one of a number of pending cases which raise the issue of implied antitrust immunity for the interconnection-related conduct of regulated telecommunications common carriers, and granting review to resolve that important jurisdictional question in this action will promote judicial economy in those other litigations.

A. Immunity Must Be Found Because of the Inconsistency Between the Antitrust and Regulatory Standards

This Court has held that immunity from the antitrust laws will attach where the standard of a federal regulatory system is inconsistent with the competitive standard of the antitrust laws. *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975) ("*NASD*"); *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). As the Court has recognized, finding immunity in such a situation is essential to protect

the regulated company from being obligated simultaneously to pursue the conflicting objectives of the antitrust and regulatory regimes.

The antitrust claim in *Gordon* challenged certain commission rate practices of the New York and American Stock Exchanges. The Court reasoned that whereas "the sole aim" of the antitrust laws is "to protect competition," 422 U.S. at 689, the practices at issue in *Gordon* were subject to regulation under a public interest standard which required the SEC to consider factors in addition to competition in determining where the public interest lies. Accordingly, the Court concluded that applying the antitrust laws to these practices would unfairly and improperly subject the defendants to conflicting standards. *Id.*

NASD reinforced the holding of *Gordon*. The Court concluded that the SEC's authority to review certain secondary market constraints under a standard different from and inconsistent with the free competition standard embodied in the antitrust laws "necessarily" compelled the conclusion that the challenged restraints were impliedly immune from the antitrust laws. 422 U.S. at 721-22. Once again, the Court focused upon the inconsistency between the regulatory and antitrust standards:

> In this instance, maintenance of an antitrust action . . . poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated.

Id. at 735.

The application of the foregoing principle to the instant case compels a finding of immunity because petitioners' interconnection-related conduct is regulated by the FCC under a public interest standard different from and inconsistent with the pure competition standard of the antitrust laws. There can be no dispute that the FCC regulates petitioners' conduct under a public interest standard. *See, e.g.*, 47 U.S.C. §§ 201, 214 (1976). Competition is one relevant factor in appraising how best to serve the public interest, but, as the court below found,

> determinations of whether a company's practices are in the public interest as defined by the [Communications] Act require FCC consideration of factors other than competition. Such factors include network safety and efficiency, the need of the public for reliable service at reasonable rates, the proper allocation of the rate burden, the financial integrity of the carriers, and the future needs of both users and carriers.

664 F.2d at 722; A-4 (footnote omitted).

In *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), this Court held that the FCC had erred in basing a decision entirely on enhancing competition rather than by considering all aspects of the public interest standard of the Communications Act. The Court explained:

> [A]s to the industry before us in this case, there has been serious qualification of competition as the regulating mechanism. The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications. . . . In this field, . . . encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest.

Id. at 93; *accord, Hawaiian Tel. Co.* v. *FCC*, 498 F.2d at 771, 777 (D.C. Cir. 1974) (FCC may not "automatically equate the public interest with additional competition"). Thus, petitioners are compelled to consider factors other than competition in filing tariffs and determining how to discharge their obligations under the Communications Act.

The predicament the Bell System faced in formulating its interconnection tariffs confirms the wisdom of this Court's conclusion that regulation under an inconsistent standard confers antitrust immunity. Petitioners were obligated to consider factors such as whether interconnection would jeopardize the technical integrity of the telephone network and thereby imperil their ability to

discharge their common carrier obligation to furnish telephone service without posing dangers to their customers or employees or impairing the quality of service. Thus, petitioners were not able simply to follow the rules that govern unregulated markets; they were required to pursue policies that best served the public interest.

In the instant case, the Court of Appeals acknowledged that the FCC regulates petitioners' conduct under a public interest standard rather than a pure competition standard. 664 F.2d at 722; A-4. It also recognized that *Gordon* and *NASD* held that antitrust immunity must be found for conduct regulated under a standard inconsistent with that of the antitrust laws. *Id.* at 726; A-9. Nevertheless, the court below concluded that immunity cannot obtain in this case because the FCC subsequently disapproved petitioners' post-*Carterfone* tariffs and therefore "this case involves no conflict between pro-competitive antitrust policies and agency policies." 664 F.2d at 733; A-16. This test fundamentally distorts the standard for a finding of implied immunity prescribed by this Court's decisions.

As demonstrated above, both *Gordon* and *NASD* held that implied antitrust immunity attaches by reason of a conflict between the legal standards of the regulatory statute and the antitrust laws, without regard to the particular policies that may be adopted from time to time by the regulatory agency pursuant to its legislative mandate. *See* 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 224(d), at 149-53 (1978). Thus, in *Gordon* this Court held that the defendants' fixed commission rate structure was immune from antitrust attack, notwithstanding that the SEC had specifically stated that it had "not approved" the practice in question and that it had subsequently disapproved the practice as contrary to the public interest. 422 U.S. at 672-75, 677. Similarly, *NASD* held impliedly immune from antitrust attack restrictive practices in the marketing of mutual fund securities which had subsequently been disapproved by the SEC. 422 U.S. at 727-28. Indeed, in *NASD* this Court explicitly stated that its

finding of implied immunity was not affected by the SEC's decision "to introduce a controlled measure of competition into the . . . market." *Id.* at 734. Thus, *Gordon* and *NASD* hold that the repugnancy between the antitrust laws and the regulatory scheme required for a finding of antitrust immunity is inconsistency between the antitrust and regulatory standards prescribed in those statutes.

The court below also concluded that antitrust immunity is unavailable because petitioners' interconnection tariffs were carrier-initiated rather than agency-initiated. *Id.* at 727 n.32, 733; A-15-16, A-32. In holding that carrier-initiated conduct cannot be impliedly immune from the antitrust laws, the Court of Appeals imposed a requirement that has never been adopted by this Court, that is irreconcilable with its implied immunity decisions, and that subverts the fundamental policy objectives that underlie those decisions.

The court below was unable to point to any language in *Gordon* or *NASD* that even hinted that action must be initiated or mandated by the regulatory agency in order to qualify for implied immunity. This failure is not surprising, because the conduct held to be immune in each of those cases was initiated by the regulated entities. In *Gordon*, this Court held that the defendants' fixed commission rate structure was immune from the antitrust laws even though it had been voluntarily established by the stock exchanges and their member firms. 422 U.S. at 663-64, 672-75. Similarly, the restrictive practices in the marketing of mutual fund securities attacked under the antitrust laws in *NASD* were held impliedly immune from such attack even though they had been voluntarily initiated by the NASD and its members. 422 U.S. at 718 n.31, 727-28.

The agency-initiation and agency-approval requirements that the court below has engrafted upon *Gordon* and *NASD* would be unworkable and unfair to regulated common carriers. As this Court recognized in *FCC* v. *RCA Communications, Inc.*, 346 U.S. at 90, and as the court below acknowledged (664 F.2d at 722; A-4), Congress has decided that decisions pertaining to the

telephone network should be based on a public interest standard. Because of the overwhelming number of decisions that must be made in relation to the telephone network and to other public utilities that are governed by a public interest standard, it would not be feasible to have regulatory agencies conceive all policies and propose all programs in the first instance. *See American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 880 (2d Cir. 1973). The regulatory system therefore depends upon carrier initiation of tariffs designed to achieve the public interest, subject, of course, to regulatory scrutiny. If antitrust liability were to turn on whether conduct were initiated by the regulatory agency, or whether the carrier correctly guessed the ultimate agency determination of its proposals, carriers would be deterred from proposing rules that served the public interest but might be inconsistent with unrestricted competition, and would propose only policies which enhanced competition, whether or not they served the public interest standard of the Communications Act.[19] This would clearly not permit the Communications Act to function as envisioned by Congress.

The test articulated in *Gordon* and *NASD* requires that petitioners' interconnection tariffs and interconnection-related conduct be held impliedly immune because they are governed by a public interest standard that is inconsistent with the pure competition standard of the antitrust laws. In concluding that immunity is precluded by carrier initiation of the subject tariffs and by the FCC's ultimate disapproval of those tariffs seven years after they were filed and after an alternative means of interconnection

19. The same fundamental misreading of *Gordon* and *NASD* also permeates the decisions of other lower courts which have held that petitioners' conduct is not impliedly immune from antitrust attack because it was carrier-initiated. *See Sound, Inc. v. American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980). *See also Litton Systems, Inc. v. American Tel. & Tel. Co.*, 487 F. Supp. 942 (S.D.N.Y. 1980); *Interconnect Planning Corp. v. American Tel. & Tel. Co.*, 465 F. Supp. 811 (S.D.N.Y. 1978); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 481 F. Supp. 120 (D.D.C. 1978); *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978).

was in place, the court below imposed requirements not contemplated by, and inconsistent with, this Court's controlling decisions.

B. Immunity Must Be Found Because of Pervasive Regulation

This Court has also ruled in a consistent line of cases that the existence of pervasive federal regulatory authority—especially common carrier regulation—immunizes conduct subject to such regulation from antitrust liability. In *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), this Court held that the Civil Aeronautics Board's regulatory authority over route allocations among airlines precluded the application of the antitrust laws. The Court based its conclusion upon the fact that the matters at issue had been committed by Congress to "pervasive regulation . . . designed to change the prior competitive system." *Id.* at 300-01.[20] Similarly, in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), the Court ruled that the antitrust laws were inapplicable to the defendant's alleged use of its control over the plaintiff to dictate the plaintiff's procurement and financing policies. The Court based its decision squarely upon the fact that the conduct in question "is subject to pervasive control by the CAB." *Id.* at 387. This line of authority was most recently reinforced by this Court in *NASD*. There, the Court held that certain activities that were not explicitly embraced by the regulatory statute involved were nonetheless immune from the antitrust laws because the agency's regulatory authority was "sufficiently pervasive to confer an implied immunity." *Id.* at 730.

Significantly, in virtually every case in which this Court has declined to find implied immunity and has upheld antitrust jurisdiction over a complaint involving conduct by a regulated company, it has based its holding upon the fact that the regulatory

20. *See also Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936) (rates applicable to services ancillary to freight warehousing held not subject to the antitrust laws because they were an integral part of the common carrier function regulated by the ICC).

statute involved did *not* subject the defendants to pervasive common carrier or public utility-type regulation with respect to the particular matters alleged in the complaint. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963); *California v. FPC*, 369 U.S. 482, 485 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 348-50 (1959).[21] Thus, contrary to the view of the court below, *Otter Tail* and kindred cases implicitly hold that common carriers are not subject to the antitrust laws with respect to activities within a pervasive scheme of regulation. Taken together with the explicit holdings of this Court in *Pan American*, *Hughes* and *NASD*, these cases unquestionably establish the broad applicability of this principle to regulated communications carriers such as petitioners.

The court below predicated its contrary holding in this case in part upon the ground that although the statutes involved in the *NASD* line of cases reflect a congressional intention to vest the regulatory agency with authority over the challenged conduct, "[t]here is no corresponding legislative history in the case before

---

21. *Otter Tail* involved an antitrust complaint charging monopolization of and attempt to monopolize the retail distribution of electric power by refusals to sell power at wholesale to proposed municipal systems, by refusals to "wheel" power to such systems, and by other conduct allegedly designed to discourage municipalities from taking over the distribution of electric power within their boundaries. 410 U.S. at 368. In holding that the antitrust laws could properly be applied to such activities in the interstate electric power transmission field, this Court specifically pointed out that Congress had considered and rejected the suggestion that the interstate transmission of electric power should be subject to pervasive common carrier regulation. 410 U.S. at 373-74. The plain implication of the majority opinion in *Otter Tail* thus is that the antitrust laws would not have been applicable to the activities involved in that case had Congress chosen to impose pervasive common carrier regulation upon the interstate transmission of electric power. Ironically, *Otter Tail* was relied upon by the Court of Appeals to justify its conclusion that petitioners' conduct here, which is pervasively regulated under such common carrier principles, is not immunized from antitrust attack. *See* 664 F.2d at 729; A-12.

us." 664 F.2d at 729; A-12. The Communications Act, however, confers upon the FCC even broader authority over the conduct at issue here than the securities laws' relatively limited grant of authority to the SEC over the conduct in *NASD*. Under the Communications Act, common carriers are required to offer to the public "all instrumentalities, facilities, apparatus and services" necessary to provide telecommunications service, 47 U.S.C. § 153(a), (b) (1976), and the FCC is directed to supervise that conduct under a public interest standard, *see id.* §§ 201, 214. Pursuant to its broad grant of authority, the FCC has for nearly three decades exhaustively exercised its regulatory powers over interconnection of equipment to the telephone network. *See* pp. 9-13, *supra*. The rationale adopted by the court below would have the ironic and wholly unjustified result of denying implied immunity under circumstances where the grant of regulatory authority under common carrier principles is broadest and most comprehensive.

The court below also grounded its decision upon its conclusion that the scope of the FCC's regulatory authority under the Communications Act "differs decisively" from that exercised by the SEC in *NASD* under the Investment Company and Maloney Acts. 664 F.2d at 730; A-13. The latter statutes, as the court below recognized, establish a pattern of self-regulation for the mutual fund industry, subject only to general oversight by the SEC. *Id.* at 729 n.35; A-33. As the SEC itself has observed with respect to the Maloney Act, such a regulatory scheme is less than comprehensive.[22] By contrast, petitioners as telecommunications common carriers are governed by a regulatory scheme "in which scarcely a single business act is free from continuous regulation or at least administrative governmental review . . ." *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 495 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

---

22. "It was thought that this kind of self-regulation was far preferable to *detailed and pervasive regulation* by the Government which might be overly burdensome to business and Government alike." Report of Special Study of Securities Markets of the SEC, H.R. Doc. No. 95, pt. 4, 88th Cong., 1st Sess. (1963) at 606 (emphasis supplied).

Finally, the court below refused to find petitioners' conduct impliedly immune because in *NASD* the regulatory agency had "continued to sanction" the challenged practice, which it asserted was a "crucial factor . . . conspicuously absent from this case." 664 F.2d at 730; A-12-13. Although the Court of Appeals' characterization of the FCC's actions with respect to petitioners' interconnection tariffs in the post-*Carterfone* period is demonstrably incorrect (*see* pp. 9-13, *supra*), even were its perception of that agency's decisions accurate it would afford no basis for denying immunity. This Court's decisions on pervasive regulation impose no requirement that the regulatory agency expressly or impliedly approve of the challenged conduct. Thus, in *NASD* the SEC ultimately disapproved the restrictive practices adopted by the defendants. 422 U.S. at 718 n.31, 727-28. In like manner, in *Pan American* this Court applied the doctrine of implied antitrust immunity, even though the CAB had so strenuously disapproved of the defendant carriers' agreement on division of territories that it actually requested the Department of Justice to bring that antitrust suit for the specific purpose of terminating the agreement. Similarly, in *Hughes* this Court found implied immunity from the antitrust laws even though the CAB, in its *amicus curiae* brief, stated that it had never mandated or sanctioned the conduct at issue there. *See* Memorandum for the Civil Aeronautics Board as *Amicus Curiae* at 10. Finally, in *Terminal Warehouse* the Court reached the same result with respect to contracts that had been specifically found by the ICC to be unlawful under the Interstate Commerce Act.

In sum, the pervasive regulation of petitioners' interconnection-related conduct by the FCC immunizes that conduct from antitrust attack. In declining to find immunity the court below imposed a set of requirements for immunity that conflicts with this Court's decisions.

* * *

As petitioners have demonstrated above, the decision of the court below conflicts both with the Court's decisions in *Gordon* and *NASD* establishing implied antitrust immunity based upon

inconsistent statutory standards and with its line of decisions recognizing such implied immunity for pervasively regulated common carrier activity. While this conflict would, in itself, warrant granting review here (*cf.* S. Ct. R. 17.1(c)), there are further considerations beyond the confines of this case which warrant such review. The decision of the court below raises an important question concerning the relationship between the Sherman Act and the Communications Act and comparable state regulatory statutes which is presently at issue in a number of other private antitrust suits pending in five different circuits, all of which are based upon the post-*Carterfone* tariffs. These cases are, like the present action, complex antitrust cases, including several purported class actions, which will almost certainly require many years and many millions of dollars to prepare, and which will unquestionably consume massive amounts of judicial resources to adjudicate. A resolution by this Court of the jurisdictional question involved here and in all of these pending cases, which has never been directly addressed by this Court as to telecommunications common carriers, would save the courts and the parties from the many lengthy and expensive trials that would be a waste of resources if petitioners' position on this issue is correct.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: June 25, 1982

Respectfully submitted,

HOWARD J. TRIENENS
Counsel of Record for Petitioners
195 Broadway
New York, New York 10007
(212) 393-5111

Of Counsel:
JIM G. KILPATRIC
WILLIAM J. JONES

ANDREW M. WHITE
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT